Demco New York Corp. *and* International Brotherhood of Electrical Workers, Local 910, AFL–CIO. Case 3–CA–22798

July 26, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS COWEN AND BARTLETT

On September 10, 2001, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as further discussed below and to adopt the recommended Order as modified.[1]

In his decision, the judge found that the Respondent, by Foreman William Grant,[2] interrogated employee Paul Castor about his union membership, activities, and sympathies in violation of Section 8(a)(1) of the Act. For the following reasons, we agree with the judge.

Facts

The facts, relevant to the interrogation finding, may be briefly stated. On September 18, 2000,[3] the Respondent hired employee Paul Castor to work as an electrician's helper at its Manor at Woodside, Poughkeepsie, New York jobsite. On September 27, the Respondent transferred Castor to its St. Lawrence University jobsite to work with Foreman William Grant. Castor testified that during the first couple of days that he worked with Grant, they talked about several different things as they got to know each other.

During a morning break on September 29, Castor made a comment to Grant about starting to become an expert in lighting when he worked at a company called Lowe's prior to working for the Respondent. In response to Castor's comment, Grant asked Castor who he worked for at Lowe's and Castor replied, "Matco." Castor testified that Grant's tone of voice changed when Grant asked Castor if Matco was a union company. Castor hesitated before responding in the affirmative. Grant then asked, inter alia, if Castor was a journeyman and a union member. Castor replied "no" to both questions, and Grant said, "Since when does a union hire out of union?" Castor replied that he was hired as an unindentured apprentice and asked Grant if he had a problem with the union. Grant responded that he did not believe in what the unions stood for. Grant then told Castor a story about a good friend with whom he worked, the friend being a union member, unbeknownst to Grant. One day the friend advised Grant that he had to picket and Grant was shocked by the announcement. Grant told Castor that thereafter he only could allow his friend to work on menial tasks because he could not trust him. Grant also stated that he would not allow that type of incident to happen to him again.

Analysis

Interrogation is not a per se violation of Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In determining whether an interrogation is unlawful, the Board examines whether, under all the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB at 1177–1178; *Emery Worldwide*, 309 NLRB 185, 186 (1992). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore House*, 269 NLRB at 1178 fn. 20; *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

Applying the above principles to the facts of this case, we find that the totality of the circumstances establishes that Grant's questioning of Castor about Castor's union sentiment reasonably tended to interfere with, coerce, and restrain the exercise of Castor's Section 7 rights.[4]

We acknowledge that several factors weigh against finding the interrogation coercive. The questioning took place in an informal setting (the tailgate of Castor's

[1] We shall modify the judge's recommended Order to conform to *Excel Container, Inc.*, 325 NLRB 17 (1997), and substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

[2] No exceptions were filed to the judge's findings that Grant is a statutory supervisor and agent of the Respondent within the meaning of Sec. 2(11) and (13) of the Act, respectively.

[3] All dates are in 2000, unless stated otherwise.

[4] In reaching this conclusion, we do not rely on the testimony of employee Brian Shaw that Project Foreman Dick Tucci questioned Shaw about his union membership at the Respondent's Victor, New York jobsite a year prior to the incident involving Castor. The Respondent contends in its exceptions that Shaw's testimony is not relevant because it involves a different supervisor and employee at another jobsite, and occurred more than a year prior to Castor's conversation with Grant. We agree with the Respondent that Shaw's testimony is not relevant. We find, however, for the reasons set forth below, that even without considering Shaw's testimony, the record evidence establishes that the Respondent (through Grant) violated Sec. 8(a)(1) of the Act.

truck), the conversation began amicably, and Grant was a relatively low-level supervisor.

However, other factors weigh in favor of finding the interrogation coercive. First, Castor was not an open union supporter and he had not revealed his union sentiment prior to the September 29 conversation with Grant. The conversation occurred early in Castor's employment, i.e., his second or third day at the St. Lawrence worksite and within 3 weeks of the start of his employment with the Respondent.

Second, the nature of the questioning here was coercive. Grant asked Castor if he were a union member. In addition, the tone of the questioning changed to hostile as soon as the Union was mentioned. Thus, when Grant heard that Castor had previously worked for a union employer, Castor testified that Grant suddenly became "upset" and "excited."

Most significantly, the questioning did not occur in a context free of other coercive conduct. Grant informed Castor of a past situation in which Grant, upon learning that a good friend and employee was associated with a union, no longer trusted the friend and began assigning him menial work. Grant ominously told Castor that he would not allow such a situation to happen to him again. We find that these comments sent a clear message to Castor that Grant distrusted union employees, and that he would consider an employee's union affiliation when assigning work. These comments are particularly coercive here because Grant, although a low-level supervisor, was nevertheless the highest-ranking official at the St. Lawrence jobsite, and was responsible for the assignment of work at that site. This implied threat to link job assignments to an employee's union support would reasonably have caused Castor to believe that Grant's questioning could result in an adverse change in Castor's working conditions.[5]

After considering the totality of the circumstances, we find that the factors mitigating the coerciveness of Grant's questioning are outweighed by those supporting a finding that the questioning was coercive. Therefore, we conclude, in agreement with the judge, that the Respondent interrogated Castor in violation of Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Demco New York Corp., East Syracuse, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its facility in East Syracuse, New York, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 29, 2000."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union membership, activities, and sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

DEMCO NEW YORK CORP.

[5] The complaint did not allege that the Respondent violated the Act by this implied threat, and we therefore do not find a separate violation based on this conduct. Nevertheless, we note that the Respondent did not object to the testimony regarding this implied threat, nor did the Respondent except to the judge's consideration of this conduct as part of the circumstances of Grant's questioning.

Greg Lehmann, Esq. and Beth Matimore, Esq., for the General Counsel.
Subhash Viswanathan, Esq. (Bond, Schoeneck & King, LLP), for the Respondent.
Dennis Affinati, for the Union.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge and amended charge filed by International Brotherhood of Electrical Workers, Local 910, AFL–CIO (the Union) on November 13, 2000, and January 23, 2001, respectively, against Demco New York Corp. (the Respondent), a complaint and notice of hearing was issued on February 21, 2001, alleging that the Respondent had violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating an employee about his union membership, activities, and sympathies. By answer timely filed, the Respondent denied the material allegations in the complaint.

A hearing in this matter was held before me in Syracuse, New York, on July 17, 2001. Subsequent to the closing of the case, the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDING OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a corporation, with an office and place of business at 6701 Manlius Center Road, East Syracuse, New York (the Respondent's facility), has been engaged as an electrical contractor installing electrical conduits, wire fixture devices, and equipment in buildings. During the past 12 months, the Respondent, in conducting its business operations, purchased and received at its East Syracuse, New York facility, goods valued in excess of $50,000 directly from points located outside the State of New York. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that the Union, at all material times, has been a labor organization within the meaning of Section 2(5) of the Act. The complaint alleges and the Respondent admits that Gregg Slocum, project manager, is a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act. However, while the complaint also alleges that William Grant, foreman, is also a supervisor and agent of the Respondent under the Act, the Respondent denies this.

III. THE ALLEGED UNFAIR LABOR PRACTICE

The Evidence

The Respondent is an electrical contractor installing electrical conduits, wire fixture devices, and equipment in buildings. Gregg Slocum is the Respondent's project manager who oversees the Respondent's work projects, at times up to six in number. Slocum testified that his job duties encompass "analyzing the subcontract, purchasing materials for the project, scheduling the labor for the project, scheduling the tasks for—the direction of the foremen on the project, close-out documents, change orders, receiving final payments, etc. . . . I also hire the staff for the field. I also terminate the staff, if need be." Slocum added that all these responsibilities retain to maintaining and the completion of the project.

Slocum hired employee Paul Castor on September 18, 2000, and assigned him to work at the Manor at Woodside, Poughkeepsie, New York. Walter Vaeth was the Respondent's foreman on this project. Castor's rate of pay was $10 per hour and $15 hourly for overtime. He was then transferred to the Respondent's St. Lawrence University site in Canton, New York, on September 27, 2000, where William Grant was the Respondent's foreman on the job. Castor was terminated on October 20, 2000. Slocum testified that when he hired Castor he directed him to follow his foreman's instructions with respect to job assignments and to direct any questions he had about his job assignments to his foreman. Slocum stated that this was "common policy."

Slocum testified that Grant's duties as foreman was to "carry out tasks that I have set up as a schedule for the project. He would then take the people, manpower, and set up tasks for them to complete those areas of the project." Slocum added that "[N]o, he's not responsible for all aspects for the completion of the project." However, in a sworn statement given to a Board agent during the investigative stage of this case, Slocum stated that "a foreman is responsible for all aspects of completion of a project, including employee safety, employee productivity, maintaining customer relations, timeliness, etc."[1] In explaining what he meant when he testified that a foreman "is not responsible for all aspects of completion of a project" Slocum testified, "Well, there are aspects of the job that he can't be responsible for. He doesn't do the final negotiations of the contract. He doesn't do closeout documents. He doesn't hire employees. He doesn't shift manpower from one job to another. These are some of the responsibilities are solely my responsibilities."

Slocum testified that foremen do not hire or fire employees, have no authority to lay off employees, or transfer them to another jobsite. Nor can foremen suspend or discipline employees. Slocum has the authority as to the above. Slocum added that while foremen can "direct an individual off the job" they then would report to him that they have done so.

Slocum related that he is responsible for usually no more than six projects with a foreman on each one. He stated that he "interacts" with the foreman on each of these jobs daily to see if the scheduled work is completed, if there are any problems

[1] Slocum testified that:

> I meant that, because I can't be on the project every day, that the foreman on the project has responsibilities to the employee safety, making sure that the tasks are carried out and the hours that allotted for that particular task. He has to also work with the customers, which are the general contractors, making sure that they're satisfied and happy. And, that basically, we keep coordinated with the other trades, so we don't fall behind schedule.

with the work, are there the proper materials present for future tasks, discussing the scope of the work, and reviewing drawings to make sure that the work is being done properly.

The Respondent's sole witness, William Grant,[2] testified that as foreman he instructs employees as to what work is to be done such as pulling wires, running conduit, or whether work has to be done underground. Grant's hourly rate of pay is $25. Grant began working at the Respondent's St. Lawrence University jobsite in September 2000. Grant stated that he does not hire employees. When he feels additional workers are needed he calls the project manager for more help. Grant does not have the authority to transfer or lay off employees. According to Grant when the job is winding down he notifies the office and tells them there is a "need to remove some people." While Grant denied that he issued any discipline, he added that if there occurred a "bad discipline" by an employee, at work, he would have the authority to "tell him to get off the job, to call the office," I assume to report this, but such an incident, according to Grant, has never happened.

Grant testified that he did not have any "responsibility" for giving raises or promoting employees but could recommend to the project manager that they were doing a good job or not. Grant stated that his authority lay in the area of assigning and directing the work of the Respondent's employees on the jobsite. Grant also relays company policies to the employees. While the Respondent issues an employee handbook to each new employee, the handbook specifically directs employees to speak to their foreman if they have questions regarding their job assignments and the Respondent's rules and policies throughout the company. Grant does have the authority to tell employees when to take their breaks and lunches, and change these times based on job needs. Moreover, Grant is the highest level representative of the Respondent at the St. Lawrence University jobsite, and between October 2 and 20, 2000, was the foreman for two of the Respondent's employees on this site. Grant admitted that project manager, Gregg Slocum, depends substantially on him as foreman on the job, since Slocum never visited the St. Lawrence University jobsite, and would rely heavily on recommendations by him "with regard to employees and to work as well."

Paul Castor, an apprentice electrician, testified that when he was hired by the Respondent's project manager, Gregg Slocum, as an electrician's helper, he was assigned to work at the Respondent's Manor at Woodside jobsite in Poughkeepsie, New York, where he was told to report to Walter Vaeth, the foreman on that job. Castor related that Slocum instructed him to direct any questions he had about job duties and assignments to the foreman on the job, Vaeth. Thereafter, he was transferred to the Respondent's St. Lawrence University jobsite where he reported to William Grant, the foreman on the job. Grant explained to Castor the Respondent's policies and rules such as: hours of work, breaktimes, and the need for safety equipment such as hard hats, glasses, and safety shoes. Castor related that Grant told him he would not be docked for time if he came 10 minutes late, that the work hours were 7 a.m. to 3:30 p.m., that morning break was at 9 a.m. and a half-hour lunchbreak at 12 noon.

Castor testified that at first Grant worked alongside him in digging trenches about 20 percent of the time. About a week later another employee, Charlie Dekin, came to work at the jobsite and Grant then only worked "at best, ten percent," with these employees. Castor stated that then Grant "did a lot of layout work and worked with the other trades foreman on the job (steel riggers, carpenters, masons). Castor related that Grant "directed us at our work, explained what he wanted done, how he wanted it done, assigned the employees new tasks when they completed their assignments, inspected the quality of their work, changed breaktimes as required by the necessity of the work, and set the time of work at 7 a.m. Castor also uncontradictedly testified that Grant asked Castor to work overtime on occasion. Grant signed Castor's time sheets, sent employees home when there wasn't enough work, and called Castor back to work the following day. Castor also testified that he asked Grant for bereavement leave but was turned down on the basis that he didn't qualify because this occurred during his probationary period and, "I just left it at that."[3]

Castor testified that he and Grant and then Dekin would all take their morning and lunch breaks together, generally, at the job trailer. Castor stated that he and Grant had conversations about "several different things" during the first few days they worked together getting "to know each other. Castor related a particular conversation he had with Grant on September 29, 2000, a Friday, about 9 o'clock in the morning, while sitting on his truck's tailgate during a break. Castor "made a comment about starting to become an expert at lighting and how I had worked at Lowe's prior to this in rewiring of lighting and stuff. . . . And, he asked me who did I work for there at Lowe's. And, I told him, you know, Matco. He goes, aren't they down from Binghamton area? And, I explained, Yes. And, he got like—his tone of voice just changed and, he goes, aren't they union? And, I kind of hesitated because of the nature there and I go, Yeah."

Castor continued:

> I told him, yes, they're union. And, he goes. Are you a Journeyman? I says, No. He goes, Since when does a union—He asked me if I was a union member at that point. And, I said, No. He says, Since when does a union hire out of union? And, I told him they hired me on as an unindentured apprentice. . . . He was just getting all excited. He said that he . . . just couldn't believe it.[4]

[2] Grant started working for the Respondent in 1991 as an electrician and with the Respondent's predecessor company Donohue since 1988. In 1994 Grant became a foreman with the Respondent.

[3] In Castor's affidavit he stated that he also had asked project manager, Gregg Slocum, for bereavement leave, but denied any inaccuracy in his testimony, about this.

[4] Castor testified that, "[a]s soon as he found out that I had worked for Matco and he questioned me whether or not . . . I was union, he was right up off my truck tailgate with—His voice was excited, you know, lifted. He seemed upset."

Castor stated that during this conversation with Grant, Grant did not threaten him. Additionally, Castor admitted that, "after that day, the subject of unions or union activity never came up again."

Castor then told Grant how he had been looking for work to satisfy his unemployment insurance requirement and although hired by the Respondent in August, was not "put to work right away or at all" and therefore the union hall called him and sent him to work for Matco.

> I went on to explain all this to him and I could just see the way he was, just, you know totally upset. Then, I went on and asked him, I go,[w]ell, what's your problem with the union? . . . Bill Grant said, I don't believe in what the unions stand for.

Castor related that Grant then told him a story about a good friend of Grant's and a good worker, who worked with Grant and who 1 day advised Grant that he had to picket. Grant said he "was just totally in shock." Castor stated that Grant then told him that thereafter he only could allow this fellow "menial tasks because he couldn't trust him."[5] Castor added that Grant ended this conversation by stating that "he would not allow that to happen again."[6] Moreover, the following Monday, both Castor and Charlie Dekin were told to park their vehicles away from the job trailer where they had previously parked.

Castor testified that after his conversation with Grant about the Union on September 29, Castor felt that Grant did not trust him anymore. Castor also admitted that he was upset at having been terminated by the Respondent.

William Grant testified that upon his request for additional help on the St. Lawrence University jobsite, Paul Castor was sent there on September 27, 2000. Both Grant and Castor at first dug and laid conduit in a trench as part of the job. The Respondent sent Charlie Dekin to assist them at the task on October 8, 2000. Grant stated that there was a 9 a.m. morning break and a half hour lunch break at 12 noon, these breaks usually being taken at or in the job trailer or on the employees' truck tailgates.

Grant testified that he had lots of conversations with Castor about sports, politics, etc. Grant stated, "[P]robably the first week, I was trying to get to know him," Grant asked Castor where he had worked before, also in order to gage his skills in doing electrical work. Grant related that he made no comment in response to Castor telling him that he previously worked at Lowe's in Watertown. Grant denied that during this conversation or any other conversation with Castor did the subject of Castor's union activity come up. Grant testified that it's not important to him whether or not an employee is union or nonunion but only the quality of his work, if they are good workers, "it doesn't matter what they are."

Grant testified that while on the Respondent's Vestal Wal-Mart jobsite, in late 1999–spring 2000, employee Mark Pittsley, employed there about 6 to 8 weeks, had come to him and said that he was a member of the IBEW and the Union had asked him to picket the site. Grant responded that, "[y]ou do what you got to do. I, of course, have to call my office and tell them. And, when you get done, come back and talk to me." Grant added that Pittsley returned and worked at the Vestal Wal-Mart job for 2 more months and then left to work on a nuclear plant. Subsequently, Pittsley sought to return to work for the Respondent but job location resulted in his not returning.

Slocum testified that while employee Paul Castor worked at the St. Lawrence University jobsite, he never visited the site. Slocum stated that he terminated Castor based on the reports by foreman William Grant of Castor's poor work performance "on the installation of the underground's" and the "slow installation of a back box." Slocum admitted that he never observed Castor's work himself. The reason given for Castor's discharge on his termination notice was that the 30-day probation performance appraisal was poor on two projects. These projects were the Woodside Manor and the St. Lawrence University sites. Slocum denied, however, that Grant had ever suggested or recommended that Castor be discharged.[7] Slocum testified that while he relies on the reports that a foreman on the jobsite relates back to him, and that he had testified earlier that he based Castor's termination on Grant's report, about Castor's work, Slocum stated that although he had spoken to Grant about Castor's job performance, he never asked, "[W]hat Grant's opinion should be on what [Slocum] should do with Castor."

The General Counsel also called as its witness, Brian Shaw, a journeyman electrician who had previously worked for the Respondent at its B.J. Wholesale Club project in Victor, New York, beginning September 21, 1999. Shaw testified that Richard Tucci was the foreman on the job to whom he reported each day. Shaw stated that other employees were also hired at the same time who he knew to be organizers for Local Union 86, International Brotherhood of Electrical Workers. Shaw related that there was an organizing campaign going on at B.J.'s and he was a "volunteer organizer."

Shaw testified about a conversation he had with Tucci on September 22, 1999. He stated:

> Early in the day, at lunchtime, Jim Hynes and Mike Farrell let it be known to everyone that they were organizers for Local 86, Rochester, New York local in the IBEW. And, later in the afternoon when I was talking to Mr. Tucci for my next job assignment, he asked me if I was a member in the local.

Shaw indicated that after he responded, "yes," Tucci informed him that he can only talk about the benefits of belonging to a union during nonworking time, such as breaks and lunchtime.[8]

[5] Castor testified that Grant had told him that he could only assign tasks to this employee that could be completed in 1 day since he didn't want jobs to remain unfinished if the employee left work to picket. Also, Castor's affidavit mentions nothing about Grant stating he could not trust this employee.

[6] While Castor testified clearly about this September 29, 2000 conversation with Grant, he could not recall what else he and Grant talked about during their other morning and lunchbreaks.

[7] While Slocum had originally testified that he relied solely on Grant's reports of Castor's poor work performance to terminate him, he now testified that he also considered his conversations with Walter Vaeth, the foreman on the Manor at Woodside job regarding Castor's work. However, in his affidavit Slocum stated that when he spoke to Vaeth about Castor's job performance, Vaeth offered no comment one way or the other, but instead stated, "that it was too early to tell." Slocum explained that Vaeth's failure to praise Castor's work lead him to believe that Castor was "not really performing."

[8] Shaw testified that, "[w]hen I first answered yes, he sounded a little bit surprised, because I caught him off guard. But, his tone of voice went back to normal and he stayed calm." Shaw admitted never having

Shaw added that only he and Tucci were present when this occurred and the conversation lasted 2 or 3 minutes.

Credibility

As to the credibility of witnesses, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); and *Northridge Knitting Mills*, 223 NLRB 230 (1976). I credit the testimony of Paul Castor since his testimony was given in a forthright manner and consistent with other believable evidence in the record.[9] Moreover, some of his testimony was corroborated by the Respondent's own witness, William Grant. Further, based on his demeanor, and other facts in the record, I find him to be a more trustworthy witness. I also find the testimony of Brian Shaw creditable since also given in a trustworthy and forthright manner and more importantly, not being currently employed by the Respondent, he has an uncontroverted disinterest in these proceedings.[10]

This is not to say that I discredit all of the testimony of Gregg Slocum, called as a witness for the General Counsel (under FRE 611(c)), and the Respondent's witness, William Grant.[11] While I admit that I was not unimpressed by their demeanor as witnesses, yet I found, for example, significant inconsistencies in the testimony of Slocum regarding the duties of Grant and the reason for Castor's termination, as between his testimony and his affidavit given to a Board agent. Additionally, Grant's testimony on cross-examination concerning his report of Paul Castor's job performance, appeared guarded and defensive. I therefore only credit their testimony where it is not in conflict with that of Castor's, or where it is consistent with the evidence in the record as will be set forth hereinafter.

Analysis and Conclusions

The complaint alleges that the Respondent by William Grant interrogated an employee about his union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act.

The Respondent denies this allegation.

Supervisory and Agency Status

The complaint alleges that Gregg Slocum, general manager, and William Grant, foreman, are supervisors within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act. The Respondent admits to the status of Gregg Slocum as a supervisor and agent of the Respondent, but denies that William Grant is either a supervisor or its agent.

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with "genuine management prerogatives" should be considered supervisors and not "straw bosses, leadman, set-up men and other minor supervisory employees." S. Rep. No. 105, 80th Cong. 1st Sees. 4 (1947).

The status of supervisor under the Act is determined by an individual's duties, not by his or her title or job classification. *New Fern Restorium Co*., 175 NLRB 871 (1969); and *Longshoremen ILA v. Davis*, 476 U.S. 380, 396 fn. 13 (1986). It is well settled that an employee cannot be transformed into a supervisor merely by the visiting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. *Advanced Mining Group*, 260 NLRB 486 (1982); and *Magnolia Nursing Home*, 260 NLRB 377 (1982). To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer statutory status. *Cypress Lawn Cemetry Assn.*, 300 NLRB 609 (1990); *Superior Bakery*, 294 NLRB 256 (1989), enfd. 893 F.2d 493 (2d. Cir. 1990); and *NLRB v. Bergen Transfer & Storage Co*., 678 F.2d 679 (7th Cir. 1982).

However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *HS Lordships*, 274 NLRB 1167 (1985); and *NLRB v. Wilson-Crissman Cadillac, Inc*., 659 F.2d 728 (6th Cir. 1961). Indeed as the court stated in *Beverly Enterprises v. NLRB*, 661 F.2d 1095 (6th Cir. 1981). "Regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's, interest before such exercise of authority becomes that of a supervisor." Thus, the exercise of some supervisory authority "in a merely routine, clerical, perfunctory or sporadic manner does not elevate an employee into the supervisory ranks," the test must be the significance of his judgment and directions. *NLRB v. Wilson-*

---

met William Grant or being on the St. Lawrence University jobsite on September 29, 2000.

Moreover, it should be noted that there is no evidence in the record that either the Union or Shaw ever filed a charge with the Board regarding this. Also, the jobsite was different, and the foreman different from the instant case. Only the Respondent itself remains the same as employer.

[9] I am aware that Castor testified that he was upset because he was, terminated by the Respondent, and although I did note some minor inconsistencies in his testimony, despite this, it appeared to me that Castor was attempting to relate truthfully what actually happened.

[10] The General Counsel offered the testimony of Brian Shaw, "to show that the Respondent has a tendency of interrogating its employees through its job foremen at various sites about their union activities," and as "background information, showing a tendency that the alleged interrogation in the case actually did, in fact, occur."

[11] It is not unusual that, based upon the evidence in the record, the testimony of a witness may be credited in part, while other segments thereof are discounted or disbelieved. *Jefferson National Bank*, 240 NLRB 1057 (1979), and cases cited therein.

Crissman Cadillac, Inc., supra; *Lakeview Health Center*, 308 NLRB 75 (1992); and *Hydro Conduit Corp.*, 254 NLRB 433 (1981). Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *NLRB v. Wilson-Crissman Cadillac, Inc.*, supra.

Nor does an employee become a supervisor because he had greater skills and job responsibilities or more duties than fellow employees. *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968). Additionally, the existence of independent judgment alone will not suffice for "the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act." *Advance Mining Group*, supra; and *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir. 1948). In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former." *Advance Mining Group*, supra; and *NLRB v. Security Guard Service*, 384 F.2d 143 (5th Cir. 1967). Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

The burden of proving that an employee is a "supervisor" within the meaning of the Act rests on the party alleging that such status exists. *Pine Brook Care Center*, 322 NLRB 740 (1996); *Ohio Masonic Home*, 295 NLRB 390 (1989); *RAHCO, Inc.*, 265 NLRB 235 (1982); and *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979).[12] Where the possession of any one of the aforementioned powers is not conclusively established, or "in borderline cases" the Board looks to well-established secondary indicia, including the individuals' job title or designation as a supervisor, attendance at supervisorial meetings, job responsibilities, authority to grant time off etc., whether the individual possess a status separate and apart from that of rank-and-file employees. *NLRB v. Chicago Metallic Corp.*, 794 F.2d 531 (9th Cir. 1986); *Monarch Federal Savings & Loan Assn.*, 237 NLRB 844 (1978); and *Flex-Van Service Center*, 228 NLRB 956 (1977). However, when there is no evidence that an individual possesses any one of the several primary indicia for statutory status enumerated in Section 2(11) of the Act, the secondary indicia are insufficient by themselves to establish statutory supervisory status. *J. C. Brock Corp.*, 314 NLRB 157 (1994); and *St. Alphonsus Hospital*, 261 NLRB 620 (1982). Additionally, whenever there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria.

In *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994), the Supreme Court set forth the test for determining whether an individual is to be deemed a supervisor. The Court noted that in making a determination on the question of one's supervisory status:

> [T]he statute requires the resolution of three questions and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in one of the 12 listed activities [in section 2(11)]? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold authority "in the interest of the employer"?

511 U.S. 573–574.

Based on the totality of the evidence I find and conclude that William Grant is a supervisor within the meaning of Section 2(11) of the Act. While it is clear from the record that Grant has no authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, it would appear that he can effectively recommend whether or not an employee is retained or discharged. With respect to oral evaluations of employees, foremen, in response to Slocum's specific inquiries, may advise him how a particular employee is doing. In this case Slocum asked Grant how Castor was performing his job. When Grant responded that he was doing poorly, Slocum then discharged Castor. Slocum testified that he relied solely on Grant's reports of Castor's poor work performance to terminate him, having never observed Castor working on the St. Lawrence jobsite himself. Moreover, Grant testified that Slocum, never having visited the St. Lawrence University jobsite, relied heavily on Grant's recommendations "with regard to employees and to work as well." Therefore, Grant's response to Slocum had an effect on Castor's terms and conditions of employment.[13]

Moreover, under the circumstances present in this case, Grant, as foreman, does have the authority to responsibly direct and assign employees, and, that his exercise of such activity requires the use of independent judgment in some instances.

Applying the indicia of assignment and responsibly to direct to the facts of a specific case is often difficult. There are no hard and fast rules: instead each case turns on its own particular facts. Clearly, not all assignments and directions given by an employee involve the exercise of supervisory authority. *NLRB v. Security Guard Service*, supra. Consequently, the Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendations and forceful suggestion and between the appearance of supervision and supervision in fact. *McCullough Environmental Services*, 306 NLRB 565 (1992), enf. denied 5 F.3d 923 (5th Cir. 1993).

In considering whether Grant is a supervisor under Section 2(11) of the Act, I also in this case look to Slocum's description of Grant's duties as foreman. Slocum testified that "the foreman on the project has responsibilities to the employee's safety, making sure that the tasks are carried out and the hours allotted for that particular task. He has also to work with the customers, which are the general contractors, making sure that they're satisfied and happy. And, that basically, we keep coordinated with the other trades, as we don't fall behind schedule." Grant additionally was the highest ranking representative of the Re-

[12] However, in *NLRB v. Health Care & Retirement Corp. of America*, 987 F.2d 1256 (6th Cir. 1993), the Sixth Circuit held that the General Counsel has the burden of establishing supervisory status.

[13] Also, in view of the above, I do not credit Slocum's testimony that when he spoke to Grant about Castor's job performance, he never asked Grant his "opinion" about what Slocum should do about Castor.

spondent on the St. Lawrence University jobsite; was paid substantially more as foreman than the other employees including Castor; told employees when to take their breaks and lunches and to change these based on need; assigned employees new tasks when they had completed their work assignments, inspected the quality of their work; signed employee timesheets; sent employees home when there wasn't enough work; and called them back when there was. Moreover, Castor testified that Grant has asked him to work overtime on occasion. Grant's duties also included many functions not entrusted to other employees, such as working with the other trades foremen on the job and the general contractors representative, discussing with Slocum, the project manager, the scope of the work, and reviewing drawings to make sure the work is being done properly. Additionally, Grant's performance as a supervisor was on a regular, ongoing basis and was not merely sporadic. *Laser Tool, Inc*., 320 NLRB 105 (1995).

I also find that the record contains ample evidence that William Grant is an agent of the Respondent acting on its behalf.

Section 2(13) of the act provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Legislative history dictates that the Board is to apply common law principles of agency in determining who is an agent under the Act. See *Longshoremen ILA* (*Coastal Stevedoring Co.*), 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir. 1995). In *Coastal Stevedoring Co.* supra, the Board noted that "when applied to labor relations, however, agency principles must be broadly construed in light of the legislative policies embedded in the Act." Moreover, in *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996), the Board held that the "common law principles of agency incorporate principles of implied and apparent authority." See *Service Employees Local 87 (West Bay Maintenance*), 291 NLRB 82 (1988), in which the Board noted:

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co*., 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, Agency § 27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity, Id. at § 8.

See also *Great American Products*, 312 NLRB 962, 963 (1993); and *Dentech Corp*., 294 NLRB 924 (1989).

As stated in a more subjective manner, "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management." *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993); and *Shen Automotive Dealership Group*, supra. The Board has also held that the burden of proof is on the party asserting that an agency relationship exists. *Shen Automotive Dealership Group*, supra.

Project manager, Gregg Slocum, testified that it was "common policy" to direct employees to follow the instructions of his foreman with respect to job assignments and duties and direct any questions about this to his foreman and he advised Castor of this when he was hired. William Grant testified that as foreman, he relays company policies to the employees. Moreover, the Respondent's employee handbook directs employees to speak to their job foreman if they have questions regarding their job assignments and the Respondent's rules and policies. Castor testified that Grant explained the Respondent's rules and policies to him when Castor was transferred to the St. Lawrence University jobsite. He stated that while Grant at first worked alongside him about 20 percent of the time, after Charlie Dekin, another employee came to the jobsite, Grant worked only "at best ten percent" of the time with these employees, representing the Respondent with the other trades' foremen on the job part of the other times. Castor stated that Grant also "directed us at our work, explained what he wanted done, how he wanted it done." Grant stated that his authority lay in the area of assigning and directing the work of the Respondent's employees on the jobsite, and the record evidence shows that the employees were aware of this.

Thus, from William Grant's real and perceived authority over the Respondent's employees, including all of the above, the Respondent can be held responsible for his conduct, as its agent, "where under all the circumstances the employees would reasonably believe that the individual [Grant] was reflecting company policy and acting on behalf of management." *Shen Automatic Dealership Group*, supra; *Kosher Plaza Supermarket*, supra.

The test for agency is whether, under all the circumstances, an employee could reasonably believe that the alleged agent was reflecting company policy and speaking for management. *Waterbed World*, 286 NLRB 425, 426–427 (1987). Moreover, as Section 2(13) of the Act provides, "the question of whether specific acts performed were actually authorized or subsequently ratified shall not be controlling."

I therefore find and conclude that William Grant is an agent of the Respondent acting on its behalf within the meaning of Section 2(13) of the Act.

Interrogation

The consolidated complaint alleges that the Respondent, by William Grant, interrogated an employee about his union membership, activities, and sympathies. The Respondent denies this allegation.

The Board, in *Blue Flash Express*, 109 NLRB 591 (1954), set forth the basic test for evaluating whether interrogations violate the Act; whether under all the circumstances the inter-

rogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. This longstanding test was reiterated in *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). In *Sunnyside Medical Clinic, Inc.*, 277 NLRB 1217, 1218 (1985), the Board stated:

> The Board in *Rossmore House* outlined some areas of inquiry that may be considered in applying the Blue Flash test, stressing that these other relevant factors were not to be mechanically applied in each case. Thus, the Board mentioned the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation.

Evidence of actual coercion is not necessary and in determining whether the conduct tends to be coercive, an objective standard is applied. The Board considers all the surrounding circumstances and in addition to the above criteria other relevant factors such as, whether the interrogation was aimed at the employee, whether the employer displayed antiunion animus, and whether the interrogation had any lawful purpose. *Sunnyside Medical Clinic*, supra. The words themselves, or the context, in which they were used, must suggest an element of restraint, coercion, or interference.

The totality of the circumstances herein establishes that the Respondent, by William Grant, unlawfully interrogated Paul Castor, an employee about his union membership, activities, and sympathies. Castor credibly testified that on September 29, 2000, William Grant asked Castor whether the company he had previously worked for was union. When Castor answered yes, the whole nature of their conversation changed. Grant asked Castor if he was a union member and Castor answered, "No." Grant questioned him about the circumstances of his previous hire. Castor stated that Grant had become "excited" and "upset" during this union discussion. After Castor asked Grant "What's your problem with the union?" Grant responded, "I don't believe in what the unions stand for."

Here, the questioning of the employee, came from the Respondent's foreman, Grant, who regularly exercised apparent and actual authority whenever he acted as the Respondent's spokesman on the jobsite. As part of his daily responsibilities, he acted as the conduit for relaying the Respondent's rules and policies to employees. Grant's questioning of Castor had no valid purpose other than to unlawfully question him about his union sentiment, which relates directly to his protected activity and seeks to elicit the precise type of information that employees are privileged to keep from their employers.[14]

Therefore, from all of the above, I find and conclude that the Respondent unlawfully interrogated an employee about his union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act.[15]

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operation of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Because of the nature of the unfair labor practices found here, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. Demco New York Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. William Grant, the Respondent's foreman, at all material times, has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act, and an agent of the Respondent acting on its behalf within the meaning of Section 2(13) of the Act.
4. By unlawfully interrogating an employee about his union membership, activities, and sympathies, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.
5. The unfair labor practice described above affects commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

---

[14] *Royal Manor Convalescent Hospital*, 322 NLRB 354, 362 (1996); *Advance Waste Systems*, 306 NLRB 1020 (1992); and *Club Monte Carlo Corp.*, 280 NLRB 257 (1986), enfd. 821 F.2d 354 (6th Cir. 1987).

[15] *Rossmore House*, supra; *Sunnyside Medical Clinic*, supra; *DeJana Industries*, 305 NLRB 845 (1991); *Cannon Industries*, 291 NLRB 632 (1988); and *Pennsy Supply, Inc.*, 295 NLRB 324 (1989) (it is unlawful interrogation for an employer to question an employee, who is not an open union supporter, about union activity, especially where the employee gives defensive answers to the questions, thereby indicating that the conversation is not merely casual or amicable).

Moreover, given the position in which the Respondent had placed Grant, it was reasonable for Castor to believe that as foreman, Grant was reflecting company policy and acting for management when Grant engaged in the conduct found to be unlawful. *Victor's Café, Inc., 52*, 321 NLRB 504, 513 (1996); and *Great American Products*, 312 NLRB 962 (1993).

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purpose.

ORDER

The Respondent, Demco New York Corp., East Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union membership, activities, and sympathies.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in East Syracuse, New York, copies of the attached notice marked "Appendix"[17] Copies of the notice on forms provided by the Regional Director for Region 3 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees ad former employees employed by the Respondent at any time since November 13, 2000.

(b) Within 14 days after service by the Region, file with the Regional Director for Region 3, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."